

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	
SBC Petition for Declaratory Ruling That)	
UniPoint Enhanced Services, Inc. d/b/a)	WC Docket No. 05-276
PointOne and Other Wholesale Transmission)	
Providers Are Liable for Access Charges)	
 Petition for Declaratory Ruling That USA)	
Datanet Corp. Is Liable for Originating)	
Interstate Access Charges When It Uses)	
Feature Group A Dialing To Originate Long)	
Distance Calls)	

COMMENTS

OF THE

UNITED STATES TELECOM ASSOCIATION

ON THE

**FRONTIER PETITION REGARDING FEATURE
GROUP-A ACCESS CHARGES**

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SUMMARY

The United States Telecom Association (USTelecom), strongly and unequivocally supports the Frontier Petition, which concerns yet another example of flagrant disregard for Commission rules and orders that threatens to undermine functioning, efficient, and competitive telecommunications markets. Based on the facts presented in the Frontier Petition, USA Datanet is using jointly-provided originating access services, and it is not exempt from access charges under the Commission's decision on the AT&T Petition concerning "IP-in-the-middle" long distance traffic. Nonetheless, USA Datanet has failed to pay its interstate access charges bills for nearly three years, even while it has obeyed an order by the New York Public Service Commission to pay intrastate access charges. In fact, USA Datanet continues its delaying tactics in this proceeding by raising frivolous procedural objections.

Current Commission rules and orders regarding intercarrier exchange of interLATA calls that originate and terminate on the public switched telephone network (PSTN) are clear—such calls are "telecommunications services" subject to access charges, whether or not the calls are transported using the Internet Protocol ("IP"), and whether or not they are transported by one carrier or more than one carrier. Providers that transmit these calls, such as USA Datanet, are interexchange carriers (IXCs) responsible for paying the access charges due for the originating and terminating access services used in call delivery.

Rather than act in good faith and pursuant to reasonable standards of commercial conduct, USA Datanet has openly flouted these Commission rules and decisions, as well as the logical import of related decisions by the New York Public Service Commission (NYPSC). USA Datanet refuses to pay for originating access services that it knowingly obtains from Frontier. Instead, USA Datanet raises a variety of frivolous arguments based on obfuscation and

hair-splitting distinctions to claim that it is not obligated to pay for the services it has received but, rather, can use them for free. Such unjust enrichment is contrary to law and equity.

USTelecom is deeply concerned about open defiance of the rule of law in the industry. Our members face nonpayment and underpayment for access services they are obliged to provide, and they are finding it difficult to remedy the situation which, in turn, threatens to harm their customers. Fundamental fairness requires, therefore, that the current regulatory structure be enforced and any regulatory reductions in intercarrier compensation do not result from arbitrage or neglect, but rather are the product of rulemaking decisions affording network owners the opportunity to recover lost revenue opportunities through other means.

Moreover, even in a more market-oriented environment, there must be clear rules governing providers' rights, obligations, and options for enforcing tariffs and agreements. The limited enforcement of existing rules experienced by Frontier in this case encourages other providers to bend the rules or even knowingly break them which, in turn, threatens the very foundation of the "pro-competitive, de-regulatory public policy framework" mandated by Congress and pursued by the Commission. Markets will not continue to develop and thrive in the face of blatant free riding and denials of responsibility for the systematic non-payment of lawful access charges.

The Commission must act quickly on this matter to preserve the legal foundation for commercial exchange and industry respect for Commission rules and orders. USA Datanet's conduct is another example of a growing culture of access charge avoidance by a subgroup of voice communications service providers who seemingly will go to any length to use access services without paying for them. Accordingly, the Commission should promptly reject those objections and grant Frontier's Petition.

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**COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION ON THE
FRONTIER PETITION REGARDING FEATURE GROUP-A ACCESS CHARGES**

The Commission wisely decided to consolidate the Petition of Frontier Telephone of Rochester (Frontier)¹ with the two other petitions in this docket because the Frontier Petition concerns yet another example of flagrant disregard for Commission rules and orders that threatens to undermine functioning, efficient, and competitive telecommunications markets. The United States Telecom Association (USTelecom),² strongly and unequivocally supports the Frontier Petition. In particular, the Commission must act quickly on this matter to preserve the legal foundation for commercial exchange and industry respect for Commission rules and orders.

¹ Petition of Frontier Telephone of Rochester, Inc. for Declaratory Ruling, *SBC Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges*, WC Docket No. 05-276 (filed Nov. 23, 2005) (Frontier Petition).

² USTelecom is the nation's leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

Based on the facts presented in the Frontier Petition, USA Datanet is using jointly-provided originating access services, and it is not exempt from access charges under the Commission's decision on the AT&T Petition concerning "IP-in-the-middle" long distance traffic.³

Nonetheless, USA Datanet has failed to pay its interstate access charges bills for nearly three years, even while it has obeyed an order by the New York Public Service Commission to pay intrastate access charges. In fact, USA Datanet continues its delaying tactics in this proceeding by raising frivolous procedural objections. Accordingly, the Commission should promptly reject those objections and grant Frontier's Petition.

I. THE COMMISSION MUST ACT QUICKLY TO PRESERVE COMMERCIAL MARKETS AND RESPECT FOR ITS RULES AND ORDERS.

Current Commission rules and orders regarding intercarrier exchange of interLATA calls that originate and terminate on the public switched telephone network (PSTN) are clear—such calls are "telecommunications services" subject to access charges, whether or not the calls are transported using the Internet Protocol ("IP"), and whether or not they are transported by one carrier or more than one carrier.⁴ Providers that transmit these calls are interexchange carriers (IXCs) responsible for paying the access charges due for the originating and terminating access services used in call delivery.

Rather than act in good faith and pursuant to reasonable standards of commercial conduct, USA Datanet has openly flouted these Commission rules and decisions, as well as the

³ *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, *Order*, 19 FCC Rcd 7457 (2004) ("AT&T IP-in-the-Middle Order").

⁴ *See* 47 C.F.R. § 69.5(b) (providing that access charges shall be assessed on "interexchange carriers"); *id.* § 69.2(s) (defining "interexchange" as ("services or facilities provided as an integral part of interstate or foreign telecommunications")); *AT&T IP-in-the-Middle Order* ¶¶ 12, 19.

logical import of related decisions by the New York Public Service Commission (NYPSC).

USA Datanet refuses to pay for originating access services that it knowingly obtains from Frontier. Instead, USA Datanet raises a variety of frivolous arguments based on obfuscation and hair-splitting distinctions to claim that it is not obligated to pay for the services it has received but, rather, can use them for free. USA Datanet's conduct is another example of a growing culture of access charge avoidance by a subgroup of voice communications service providers who seemingly will go to any length to use access services without paying for them.

USA Datanet continues its pattern of delaying tactics and disregarding legal authorities to this day by arguing in this proceeding that the Commission cannot take up the issue because of a pending court proceeding and alleged infirmities in that court's referral. Indeed, USA Datanet's Motion to Dismiss⁵ appears to be in tension, if not outright conflict, with the position USA Datanet took before the United States District Court for the Northern District of New York in a related proceeding. As Frontier explains in its Opposition to Motion to Dismiss,⁶ USA Datanet argued that the district court could not hear the case under the doctrine of primary jurisdiction and, instead, that the Commission should resolve the matter. Therefore, USA Datanet's opposition to Commission action on the Frontier Petition is, at best, unhelpful and inconsistent with good faith resolution of the dispute.

USTelecom members include the local exchange carriers (LECs) that provide the majority of originating and terminating exchange access services in this country. For decades,

⁵ USA Datanet Corp. Opposition and Motion to Dismiss, *SBC Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges*, WC Docket No. 05-276 (filed Dec. 6, 2005) (USA Datanet Motion to Dismiss).

⁶ Frontier Opposition to Motion to Dismiss, *SBC Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges*, WC Docket No. 05-276 (filed Dec. 12, 2005).

the legal structure for telecommunications has been based on the Calling Party Network Pays (CPNP) model, which has necessarily involved intercarrier compensation payments, including interstate access charges, and network owners invested in reliance on the CPNP legal structure. USTelecom, therefore, is deeply concerned about open defiance of the rule of law in the industry. Our members face nonpayment and underpayment for access services they are obliged to provide, and they are finding it difficult to remedy the situation which, in turn, threatens to harm their customers. Fundamental fairness requires, therefore, that the current regulatory structure be enforced and any regulatory reductions in intercarrier compensation do not result from arbitrage or neglect, but rather are the product of rulemaking decisions affording network owners the opportunity to recover lost revenue opportunities through other means.

USTelecom members rely on exchange access revenue to operate and maintain their networks, which provide vital public safety and carrier of last resort obligations. Their ability to maintain these networks, however, is directly threatened when IP-based carriers that transmit interexchange PSTN-to-PSTN calls refuse to pay their fair share of access charges, choosing instead to engage in creative schemes to avoid payment. Consequently, the Commission should promptly encourage more responsible conduct, and make it feasible for service providers to recover revenue lost due to unlawful access avoidance and “call laundering” arrangements.

USA Datanet’s conduct in this case, like other access avoidance schemes, is motivated by the arbitrage opportunities that motivated the Commission to initiate intercarrier compensation reform. As the Commission wrote, “the existing patchwork of intercarrier compensation rules ... is increasingly unworkable in the current environment and creates distortions in the market at the

expense of healthy competition.”⁷ Therefore, USTelecom supports positive intercarrier compensation reform towards more unified treatment of traffic and away from pervasive regulation in favor of deciding intercarrier compensation arrangements through commercial dealing where possible.⁸ Such reform is more achievable if current rules are enforced and all providers pay the lawful charges for the originating and terminating access services they use. As more traffic is routed, or technologies are selected, based on uneconomic regulatory arbitrage opportunities, it becomes more difficult to create efficient markets and enforce transition plans that preserve the public interest.

In the meantime, and perhaps even more critically in a more market-oriented environment, there must be clear rules governing providers’ rights, obligations, and options for enforcing tariffs and agreements. The limited enforcement of existing rules experienced by Frontier in this case encourages other providers to bend the rules or even knowingly break them which, in turn, threatens the very foundation of the “pro-competitive, de-regulatory public policy framework”⁹ mandated by Congress and pursued by the Commission. Markets will not continue to develop and thrive in the face of blatant free riding and denials of responsibility for the systematic non-payment of lawful access charges.

Regulatory arbitrage and flagrant disregard for the letter and spirit of the decisions of the Commission and other regulatory authorities ultimately will damage access to capital for *all* telecommunications providers, particularly in the absence of reasonable assurances that network

⁷ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 ¶ 3 (March 3, 2005).

⁸ Comments of the United States Telecom Association on the Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, CC Dkt. No. 01-92 (filed May 23, 2005).

⁹ H.R. Rep. No. 104-458, at 1 (1996).

owners can turn elsewhere to profit from their investments. In fact, investing in telecommunications networks may come to be seen as increasingly risky in the absence of regulatory certainty, meaningful enforcement, and moderation of disputes and mistrust among providers. Increasing regulatory risk in this manner clearly would increase the cost of capital for all telecommunications providers which, in turn, would have to reduce investment in, and deployment of, broadband facilities.

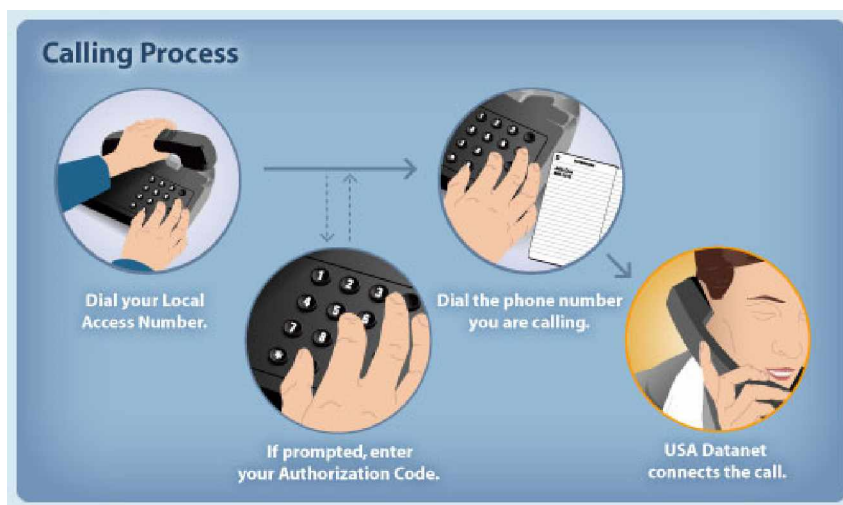
Consequently, the Commission should take prompt steps to encourage more responsible conduct, and make it feasible for service providers to recover revenue lost due to unlawful access avoidance and “call laundering” arrangements. Specifically, the Commission ought to act quickly on the Frontier Petition to preserve the conditions that are conducive to competitive markets by reiterating that access charges are owed on IP-in-the-middle interexchange voice traffic. In addition, the Commission should take additional steps to ensure that its rules are clear and to deter unreasonable interpretations and evasions of its rules. For example, the Commission may find that the public interest would be served through more aggressive use of enforcement processes against access charge avoidance, much as USTelecom suggests to the Commission in its Phantom Traffic Proposal.¹⁰

¹⁰ A USTelecom Proposal for Commission Action on Phantom Traffic, submitted in letter dated November 10, 2005 from Jeffrey S. Lanning, USTelecom, to Marlene H. Dortch, Federal Communications Commission, *Intercarrier Compensation Reform*, CC Dkt No. 01-92.

II. USA DATANET IS USING JOINTLY-PROVIDED FEATURE GROUP-A ORIGINATING ACCESS SERVICES, FOR WHICH IT OWES ACCESS CHARGES.

A. USA Datanet Is Using Frontier's Feature Group-A Originating Access Services.

Frontier is providing USA Datanet with access services that are well established and covered by Frontier tariffs.¹¹ Customers choosing to subscribe to USA Datanet long distance services must first dial ordinary seven-digit local numbers and obtain a second dial tone before dialing the telephone number of the party they wish to call, as shown in the following illustration from the USA Datanet web page.¹²



The calls are originated and terminated on the Public Switched Telephone Network (PSTN) using traditional CPE. USA Datanet only provides long-haul transport of the calls—the same long distance service provided by other telecommunications service providers. Indeed, USA Datanet refers to the dial-around offering that is the subject of the Frontier Petition as “traditional phone service.”¹³

¹¹ Frontier Petition, at 3.

¹² <http://www.usadatanet.com/popup/puHowTo.html>.

¹³ <http://www.usadatanet.com/customerService.html>

USA Datanet's use of Frontier's network is just the sort of "unequal access" upon which MCI and other IXCs relied in the early days of long distance competition, and it is commonly referred to as Feature Group-A access. These FG-A services are not new and novel, and USA Datanet is not making any unconventional use of the services; it is using them just as it would use any other originating access services, namely to receive PSTN-originated interLATA voice communications traffic. Nor is USA Datanet taking any reasonable steps to avoid using Frontier's FG-A services. As set forth in the Frontier Petition, USA Datanet markets long distance service to local exchange service customers in the Rochester, New York area (among others), the majority of whom receive their local exchange service from Frontier.

Frontier states in its Petition that USA Datanet does not obtain the FG-A service solely from Frontier.¹⁴ Instead, it obtains its seven-digit FG-A number from PAETEC Communications, Inc., a competitive local exchange carrier ("CLEC") that operates in Rochester and exchanges traffic with Frontier pursuant to an interconnection agreement. Therefore, the FG-A relationship between USA Datanet and Frontier would be analogous to the relationship between MCI and other IXCs on the one hand, and smaller, independent ILECs in the early days of long distance competition, namely the joint provision of access. Accordingly, Frontier states that it only bills for the rate elements in its tariffs that are actually used by Frontier, following industry standard "multiple carrier, multiple bill" options for meet-point billing of access charges.¹⁵

The NYPSC found that USA Datanet is using intrastate access services, and USA Datanet is now paying for its use of those intrastate services. Specifically, over 43 months (3 ½ years), ago the NYPSC ruled:

¹⁴ Frontier Petition, at 3.

¹⁵ *Id.*

- (a) Datanet holds itself out as providing voice telephony service.
- (b) It does not provide enhanced functionality to its customers, such as storing, processing or retrieving information.
- (c) Its customers are not required to use CPE different from the CPE used to place ordinary calls over the public switched telephone network.
- (d) Its customers place calls to telephone numbers assigned in accordance with the North American Numbering Plan.
- (e) Its use of Internet protocol is only incident to its own private network and does not result in any net protocol conversion to the end user.
- (f) A substantial portion of its traffic uses no IP conversion at all and is handled by interexchange carriers (IXCs).
- (g) It uses the same circuit-switched access as obtained by IXCs and imposes the same burdens on the local exchange as do IXCs.

Accordingly, we conclude that the service provided by Datanet is simple, transparent long distance telephone service, virtually identical to traditional circuit-switched carriers. Its service fits the definition of “telecommunications” contained in the 1996 Telecommunications Act and is not “information service” or “enhanced service.” Thus, its traffic is access traffic just like any other IXC’s traffic. We also conclude that DataNet imposes the same burdens on the local exchange as do other interexchange carriers and should pay all applicable and appropriate charges paid by other long distance carriers, including access charges. In addition, we find that Frontier raised the issue of access charges in a timely manner, as soon as it discovered the nature of DataNet’s service, and did not intentionally delay its request for payment.¹⁶

The same logic applies to interstate access services, particularly in light of the Commission’s decision in the *AT&T IP-in-the-Middle Order*. There is no functional difference between intrastate and interstate access in this context, which forecloses any reasonable argument that USA Datanet is not using access. Frontier began billing for interstate access over 33 months (nearly 3 years) ago but, instead of paying the bills for the services it has been using,

¹⁶ *Complaint of Frontier Telephone of Rochester Against US Datanet Corp. Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges*, Case 01-C-1119, Order Requiring Payment of Intrastate Carrier Access Charges, at 8-9 (New York Public Service Commission May 31, 2002) (appended to Frontier Petition as Exhibit B).

USA Datanet has used frivolous legal arguments and unreasonable interpretations of Commission guidance to delay making payment. Such recalcitrance harms the entire industry and the Commission should not let it stand any longer.

B. USA Datanet Knew That It Was Using Tariffed Services and It Reasonably Could Have Refrained from Accepting Traffic If It Disagreed with the Tariffs.

Frontier explains in its Petition that USA Datanet apparently has taken the position that it is not liable to Frontier because it did not order Feature Group-A service directly from Frontier.¹⁷ The problem with this argument is that USA Datanet intentionally obtained and continues to use Feature Group A service from Frontier. Similarly, USA Datanet apparently argues that it is entitled to use Frontier's services at no charge because its Feature Group A number was assigned by PAETEC and not by Frontier. This argument is also unavailing. USA Datanet openly marketed its services to Frontier end users, seeking their business (on the basis of lower rates, which is possible in significant part because of access avoidance). In turn, Frontier clearly offered the services used by USA Datanet pursuant to tariff, and USA Datanet plainly understood that Frontier believed that the traffic was covered by its tariffs. Therefore, any narrow arguments about specific tariff language or the history of joint provision of FG-A access miss the point. USA Datanet is using services that are plainly covered by tariff and, under core principles of law and equity, it may not receive a windfall by reaping the benefit of those services without paying for them.¹⁸

¹⁷ Frontier Petition, at 7.

¹⁸ There are a variety of legal and equitable theories and claims that may apply, such as Constructive Ordering, Quantum Meruit, Quasi-Contract, Implied-in-Law Contract, Unjust Enrichment, and Restitution. All of them share the basic principle that our legal system will not tolerate windfalls that permit parties to receive the benefits of goods and services without providing just compensation. *See, e.g., Exchange Network Facilities for Interstate Access (ENFIA)*, Memorandum Opinion & Order, 71 FCC 2d 440 ¶ 48 (1979); *Policy and Rules*

Apparently, USA Datanet has also claimed that it is “not interconnected in such a manner that it can expect to receive access services from Plaintiff, because USA Datanet does not interconnect directly with Plaintiff at all.” Instead, according to USA Datanet, it has taken “reasonable steps to prevent the receipt of access services” from Frontier by interconnecting with PAETEC.” To the contrary, USA Datanet has not taken any steps to avoid using Frontier’s originating access services. USA Datanet has always had a simple remedy for not paying originating access—it could choose not to accept the calls, or not market its service to end users making calls from telephones on Frontier’s network. What USA Datanet cannot do is to use Frontier’s services without paying lawful charges for those services.

C. The Contractual Relationship Between USA Datanet and PAETEC Is Separate from USA Datanet’s Use of Frontier’s Services, and that Contract Does Not Limit Frontier’s Rights.

It is Frontier's understanding that does not actually bill its share of originating access charges to USA Datanet, but instead that the two carriers have some kind of contractual arrangement. This arrangement is irrelevant to the amount of access charges owing by Datanet to Frontier. Whether USA Datanet owes access charges to PAETEC is governed by agreement (if any) between them or by PAETEC tariffs, but neither governs the relationship between USA Datanet and Frontier. To the extent USA Datanet and PAETEC have agreed that their relationship relates to information access, this conclusion is not binding in any way on Frontier. Neither PAETEC nor USA Datanet has standing or legal authority to impose legal interpretations or service definitions on other carriers. Instead, when USA Datanet receives traffic from

Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as Amended, Order on Reconsideration, 12 FCC Rcd 15014 ¶34 (1997). See generally, American Law Institute, Restatement of Restitution (1937); E. Allan Farnsworth, Contracts § 3.15 (1982)

Frontier end users (something it is doing knowingly in this case), the terms of service are those set forth in Frontier's tariffs.

III. USA DATANET'S SERVICE CLEARLY IS NOT EXEMPT FROM ACCESS CHARGES UNDER THE "IP-IN-THE-MIDDLE" DECISION.

A. The Commission Clearly Ruled that PSTN-Originated Voice Communications Are Outside the Scope of the ESP Exemption.

The traffic at issue plainly falls within the scope of the *AT&T IP-in-the-Middle Order*:

(1) the calls originate and terminate on regular handsets on the PSTN; (2) there is no net protocol conversion, as measured from the beginning and the end of the calls; and (3) customers receive no added functionality.¹⁹ The Commission clearly explained in its decision that access charges are due on calls handled by multiple providers. The fact that one of those providers characterizes itself as an information service provider does not alter the fact that access charges are owed. Moreover, the Commission's decision plainly covers originating as well as terminating access. Finally, the Commission's decision was not limited to "1+" dialing, even if some of its language addressed that subset of interstate access traffic. It is illogical to argue, as USA Datanet does, that 7-digit dialed long distance voice communications are eligible for the ESP exemption when "1+" calls are not. There is no public policy or technological reason for such a distinction.

In sum, the traffic is interstate telecommunications traffic subject to originating and terminating access charges, and Frontier is owed the compensation specified in its tariffs for the originating access services it provided. No argument raised by USA Datanet refutes this basic fact, and USA Datanet cannot offer any basis to conclude that the Commission did not intend access charges to apply. Accordingly, the public interest will best be served through firm and

¹⁹ See, *AT&T IP-in-the-Middle Order*, 19 FCC Rcd 7457.

prompt Commission action rejecting USA Datanet's attempts at legal hair-splitting and obfuscation.

The Commission articulated a clear rule and several applications of the rule in the *AT&T IP-in-the-Middle Order*, and this should be sufficient guidance for the industry. The Commission should not have to, and indeed cannot, issue individual rulings and specific guidance for every individual factual pattern and each permutation of the possible service arrangements. Therefore, the burden falls on the industry to make markets work. If industry participants behave responsibly and in act in good faith, commercial dealing and market transactions will take place based on Commission rules and guidance to deliver telecommunications services efficiently to consumers throughout our country. Markets do not work efficiently and consumers suffer, however, when firms such as USA Datanet persist in their efforts to evade the basic obligation to pay for the services that they use.

***B. USA Datanet Is Not Providing Any Information Service
to Its Subscribers Who Are Frontier End Users.***

Although USA Datanet apparently has argued to Frontier, the NYPSC, and the United States District Court that it is offering an information service,²⁰ this argument is without merit. Indeed, USA Datanet itself markets its service as traditional long distance service.²¹ To the extent that USA Datanet is using IP, it is doing so solely as a transmission protocol, and not to provide information service. Moreover, as explained in the Frontier Petition, USA Datanet regularly doesn't even use IP on routes for which it claims the ESP Exemption. Accordingly, USA Datanet is using Frontier access services to provide telecommunications and not information services. There is no public policy basis for extending an exemption from

²⁰ Frontier Petition, at 3-6.

²¹ *E.g.*, <http://www.usadatanet.com/longDistance.html>.

originating access charges to USA Datanet when the service for which USA Datanet is obtaining access is a telecommunications service under the Act.

IV. USA DATANET'S PROCEDURAL OBJECTIONS ARE FRIVOLOUS AND SHOULD BE REJECTED.

A. The United States District Court Plainly Referred the Issue to the Commission, and the Court Is Awaiting a Commission Decision.

The District Court explicitly determined that the Commission has primary jurisdiction,²² and it stayed the proceeding pending Commission action clarifying whether providers in USA Datanet's situation are liable for originating access.²³ USTelecom agrees with Frontier that this appears to be is a textbook "referral" to the Commission, one which follows Supreme Court precedent.²⁴ The United States District Court for the Western District of New York stayed its proceeding to give the parties an opportunity to seek an administrative ruling on the issues within the special competence of the Commission:

"The Court declines to dismiss the action, but agrees that the doctrine of primary jurisdiction applies. ... Accordingly, based upon all of the factors discussed above, the Court finds that it would be prudent to stay the instant case until such time as the FCC resolves the issue whether or not VoIP providers such as Datanet are liable for access charges."²⁵

Moreover, the Western District's decision in the instant matter is in keeping with the primary jurisdiction standards set forth by the US Supreme Court: "[Primary Jurisdiction] requires the

²² *Frontier Tel. of Rochester v. USA Datanet Corp.* 05-CV-6056-CJS, slip op., at 9 (N.D.N.Y. Aug. 4, 2005) (*District Court Referral*) (a copy of the Decision and Order is attached to the Frontier Petition as Exhibit D).

²³ *District Court Referral*, at 13

²⁴ Frontier Opposition to Motion to Dismiss.

²⁵ *District Court Referral*, at 9-13.

court to enable a ‘referral’ to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.”²⁶

***B. The Commission Is Free To Interpret Its Rules, and
Cannot Be Stopped by USA Datanet’s Procedural Tricks.***

USA Datanet argues that Frontier may not bring this matter before the Commission for a declaratory ruling but, instead, must bring an enforcement action pursuant to section 208. This is simply wrong as the District Court plainly seeks a Commission determination of general applicability—“whether or not VoIP providers *such as* Datanet are liable for access charges.” Moreover, even if USA Datanet were correct and the Commission could not properly resolve the specific application of its rules to the dispute between Frontier and USA Datanet under section 207, it can and, indeed, should in the public interest, determine the issue generally. The existence of fact-specific disputes in court cases or complaint proceedings does not prevent the Commission from undertaking its responsibility to make rules and interpret them. Even in the face of specific adjudications, the Commission has authority to clarify, or even to revise, its rules subject to the requirements of the Administrative Procedure Act, which have been satisfied here. The specific issue is properly raised in this docket, and the Commission is providing adequate notice and sufficient opportunity for comment.

V. CONCLUSION.

As shown in the foregoing discussion, the Commission must act quickly on this matter to preserve the legal foundation for commercial exchange and industry respect for Commission rules and orders. USA Datanet is using jointly-provided originating access services, and it is not exempt from access charges. Nonetheless, USA Datanet has failed to pay its interstate access

²⁶ *Reiter v. Cooper*, 507 U.S. 258, 268-269 (1993).

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charges bills for nearly three years, even while it has obeyed an order by the New York Public Service Commission to pay intrastate access charges. Instead, USA Datanet continues its delaying tactics in this proceeding by raising frivolous procedural objections. Accordingly, the Commission should promptly reject those objections and grant Frontier's Petition.

Respectfully submitted,

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